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In the Supreme Court of the United States

OCTOBER TERM, 1961

No.

UNITED STATES OF AMERICA, APPELLANT

v.

KENNETH E. STALEY, LEE N. MAYS, ROY M. CASH, AND ROBERT M. O'CONNOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court rendered no formal opinion. Its order dismissing the Sherman Act count of the indictment as to the individual defendants (the appellees here) is set out in the Appendix, *infra*, pp. 7-8.

JURISDICTION

The count of the indictment involved in this appeal was filed under Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1. The order of the district court dismissing the count as to appellees, on the

ground that Section 1 of the Sherman Act is inapplicable to the offenses charged against them, was entered on January 17, 1962 (App., *infra*, pp. 7-8). The order denying the government's motion for reconsideration of the dismissal order was entered on February 12, 1962 (R. 39; see Tr. 113). The notice of appeal was filed on February 16, 1962. The jurisdiction of this Court to review the order on direct appeal is conferred by 18 U.S.C. 3731. *United States* v. *Hutcheson*, 312 U.S. 219; *United States* v. *Borden Co.*, 308 U.S. 188.

QUESTION PRESENTED

Whether a corporate officer may be prosecuted under the Sherman Act for antitrust violations committed in the course of his corporate duties.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 14 of the Clayton Act, 38 Stat. 736, 15 U.S.C. 24, provides:

> That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such

violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

STATEMENT

Count one of a two count indictment returned on October 12, 1961, charged General Motors Corporation, three corporate trade associations of Chevrolet dealers, and four individuals (the appellees here) with a conspiracy to suppress and eliminate competition in the sale and distribution of Chevrolet automobiles in the Southern California area, in violation of Section 1 of the Sherman Act (R. 2-8).[1] The four individual appellees—Staley, Mays, Cash, and O'Connor—were identified as the general sales manager, the assistant general sales manager, the Pacific Coast regional manager, and the Los Angeles zone manager, respectively, of the Chevrolet Motor Division of General Motors Corporation (R. 3-4). The indictment further alleged that the "officers, directors, agents, employees, or representatives" of each corporate defendant, "while engaged in the management, direction, or control of its affairs, authorized, ordered, or did" each act with which the corporate defendant was charged (R. 4).

On December 18, 1961, the individual defendants filed

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[1] The second count, not involved in this appeal, charged the same acts as violations of Section 14 of the Clayton Act (R. 9-10).

a motion to dismiss count one of the indictment as to them, on the ground that corporate officials acting in violation of the antitrust laws in their representative capacities can be charged only under Section 14 of the Clayton Act and not under Section 1 of the Sherman Act (R. 11-12).[2] After hearing oral argument, the district court on January 17, 1962, granted appellees' motion to dismiss, on the ground that count one "fails to charge these moving defendants with an offense under 15 U.S.C. Section 1." The district court cited four cases in which other district courts had dismissed indictments charging corporate officials under the Sherman Act.[3] The government filed a motion to reconsider (R. 17-19), which was denied from the bench on February 12, 1962 (Tr. 103).

THE QUESTION IS SUBSTANTIAL

This case presents the same issue as that involved in *United States* v. *Wise*, No. 488, this Term, in which this Court noted probable jurisdiction on December 18,

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[2] The motion also sought dismissal of count two, charging the individual defendants with violation of Section 14 of the Clayton Act, on the ground that since the count also charged them with violating Section 1 of the Sherman Act, it was duplicitous (R. 12). The district court also granted this part of the motion (R. 15, App. p. 8, *infra*). The government has not appealed from the dismissal of count two, but plans to file a superseding information covering the offense charged therein.

[3] *United States* v. *National Dairy Products Corp.*, 196 F. Supp. 165 (W.D. Mo.), probable jurisdiction noted, *sub nom. United States* v. *Wise*, No. 488, this Term, 368 U.S. 945; *United States* v. *A. P. Woodson Co.*, 198 F. Supp. 582 (D.D.C.); *United States v. American Optical Co.*, No. 61 CR 82 (E.D. Wis.), indictment dismissed in part November 20, 1961, pending on appeal *sub nom. United States* v. *Kniss et al.*, No. 762, this Term; and *United States* v. *Milk Distributors Ass'n Inc.*, Cr. No. 25658 (D. Md.), indictment dismissed in part, December 29, 1961 (R. 14-15).

1961, 368 U.S. 945, and in *United States v. Kniss*, No. 762, this Term, pending on jurisdictional statement. The question is whether corporate officials may be prosecuted under the Sherman Act for antitrust violations committed in the course of their corporate duties. The district court in the present case—as did the district court in the *Wise* case—dismissed an indictment under the Sherman Act, against the individual defendants, on the ground that corporate officers may be prosecuted only under Section 14 of the Clayton Act. The question is important in the administration of the Sherman Act and, for the reasons set forth in our briefs in the *Wise* case, we believe that the ruling of the district court was erroneous.

The *Wise* case is scheduled to be argued this Term. We suggest that the Court defer acting on this appeal until *Wise* has been decided. If the Court reverses in *Wise*, summary reversal in this case would be appropriate. If, on the other hand, the Court were to affirm in *Wise*, the government would then be prepared to dismiss this appeal, or, alternatively, the Court could summarily affirm the judgment.

CONCLUSION

This appeal presents a substantial question of public importance. In view of the pendency of the *Wise* case, however, the Court should defer acting on this appeal until *Wise* has been decided.[4]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RICHARD H. STERN,
Attorney.

APRIL 1962

[4] The government has suggested that the Court should similarly defer acting on the appeal in the *Kniss* case, No. 762, this Term, until *Wise* has been decided.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30,132-Crim.

Order Granting Motions of Certain Defendants to Dismiss Indictment.

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

GENERAL MOTORS CORPORATION;
LOSOR CHEVROLET DEALERS ASSOCIATION;
DEALERS' SERVICE, INC.;
FOOTHILL CHEVROLET DEALERS ASSOCIATION;
KENNETH E. STALEY;
LEE N. MAYS; ROY M. CASH; and
ROBERT M. O'CONNOR,
Defendants.

This cause having come before the court for hearing on motions of defendants Staley, Mays, Cash and O'Connor to dismiss, as against said moving defendants, Count I and Count II of the indictment on file herein; notice of which motions was filed December 18, 1961; and the matter having been argued and submitted for decision on January 15, 1962;

It now appearing to the court that Count I of the indictment herein fails to charge these moving defendants with an offense under 15 U.S.C. Sec. 1 (*United States* v. *National Dairy Products Corp.*, 196 F. Supp. 155 (W.D. Mo. 1961); *United States* v. *A. P. Woodson Co.*, 198 F. Supp. 582 (D.C. D.C. 1961); *United States* v. *American Optical Company*, 1961 Trade Cases Para. 70,156 (E.D. Wis. Nov., 1961); *United States* v. *Milk Distributors Association, Inc.* (Crim. No. 25658, D.C. Md., December 29, 1961));

And it further appearing that Count II of the indictment herein charges these moving defendants with two or more offenses and is therefore duplicitous and defective (Rule 8(a), F.R. Crim. P.);

IT IS NOW THEREFORE ORDERED that the motions of defendants Staley, Mays, Cash and O'Connor to dismiss Count I of the indictment are hereby granted, and Count I is hereby dismissed as to said moving defendants.

IT IS FURTHER ORDERED that the motions of defendants Staley, Mays, Cash and O'Connor to dismiss Count II of the indictment are hereby granted, and Count II is hereby dismissed.

IT IS FURTHER ORDERED that the plea of defendants General Motors Corporation, Losor Chevrolet Dealers Association, Dealers' Service, Inc., and Foothill Chevrolet Dealers Association to Count I of the indictment herein is hereby set for February 26, 1962.

IT IS FURTHER ORDERED that the Clerk shall this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

DATED January 17, 1962.

/s/ THURMOND CLARKE
Thurmond Clarke
United States District Judge

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